STATE OF MICHIGAN
IN THE SUPREME COURT

ANILA MUCI,

Plaintiff-Appellee,

vs.

STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,
a foreign corporation

Defendant-Appellant.

Supreme Court No. 129388
Court of Appeals No. 251438

Wayne County Circuit Court
No. 03-304534-NF

/

BUCKFIRE & BUCKFIRE, P.C.
BY: DANIEL L. BUCKFIRE (P-46286)
THOMAS N. ECONOMY (P-60307)
Attorneys for Plaintiff-Appellee
17117 West Nine Mile Road, #1135
Southfield, MI 48075
(248) 569-4646

HEWSON & VAN HELLEMONT, P.C.
BY: JAMES F. HEWSON (P27127)
Attorneys for Defendant-Appellant
29900 Lorraine, Suite 100
Warren, MI 48093
(586) 578-4500

GROSS, NEMETH,
& SILVERMAN, P.L.C
BY: JAMES G. GROSS (P28268)
Attorneys of Counsel for
Defendant-Appellant
615 Griswold, Suite 1305
Detroit, MI 48226
(313) 963-8200

/

129388

PLAINTIFF-APPELLEE'S RESPONSE TO DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

TABLE OF CONTENTS

PAGE

INDEX OF AUTHORITIES

CASES **PAGE(S)**

STATUTES & COURT RULES

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

Plaintiff-Appellee, Anila Muci, concurs with Defendant-Appellant that this Honorable Court has jurisdiction pursuant to MCR 7.301(A)(2).

STANDARD OF REVIEW

Plaintiff-Appellee, Anila Muci, concurs with Defendant-Appellant State Farm's Standard of Review.

COUNTER STATEMENT OF QUESTIONS PRESENTED

I. CAN A TRIAL COURT ENTER AN ORDER PURSUANT TO MCR 2.311 SETTING FORTH THE SCOPE AND CONDITIONS OF A DEFENSE MEDICAL EXAMINATION IN A FIRST PARTY NO FAULT CASE?

The Trial Court answered, "Yes."

The Court Of Appeals answered, "Yes."

Plaintiff-Appellee says , "Yes."

Defendant-Appellant says, "No."

II (A) WAS THE TRIAL COURT'S ORDER PERMITTING PLAINTIFF'S ATTORNEY OR REPRESENTATIVE'S ATTENDANCE AT THE EXAMINATION AN ABUSE OF DISCRETION?

The Trial Court answered, "No"

The Court Of Appeals answered, "No."

Plaintiff-Appellee says , "No."

Defendant-Appellant says, "Yes"
"

II (B) WAS THE TRIAL COURT'S ORDER PERMITTING AUDIO/VISUAL RECORDING OF THE EXAMINATION AN ABUSE OF DISCRETION?

The Trial Court answered, "No"

The Court Of Appeals answered, "No."

Plaintiff-Appellee says , "No."

Defendant-Appellant says, "Yes"

II (C) DOES THE TRIAL COURT'S ORDER LIMITING THE SCOPE OF THE EXAMINATION MATERIALLY AND ADVERSELY AFFECT THE ACCURACY AND CREDIBILTY OF THE EXAMINATION RESULTS?

The Trial Court answered, "No"

The Court Of Appeals answered, "No."

Plaintiff-Appellee says , "No."

Defendant-Appellant says, "Yes"

III. DID THE COURT OF APPEALS ERR WHEN IT DID NOT ADDRESS THE OTHER CONDITIONS BECAUSE DEFENDANT WAIVED ANY CHALLENGE TO THE CONDITIONS?

The Trial Court did not address this question.

The Court Of Appeals answered, "No."

Plaintiff-Appellee says , "No."

Defendant-Appellant says, "Yes"

COUNTER STATEMENT OF FACTS

The present action is a lawsuit for no-fault benefits arising out of an automobile accident which occurred on May 15, 2002. As a result of the accident, the Plaintiff sustained significant injuries, including, but not limited to: a closed head injury, and injuries to her back, neck, and chest.

Defendant unilaterally scheduled medical examinations of Plaintiff without obtaining a court order pursuant to MCR 2.311, or consulting with Plaintiff's counsel. **(Exhibit 1)** Plaintiff requested that Defendant agree to orders and certain conditions within the guidelines of MCR 2.311 as outlined in **Exhibit 2**.

Defendant then filed a Motion To Compel Independent Medical Examinations, seeking the trial court to issue an order compelling the Plaintiff to submit to defense medical examinations without any conditions whatsoever. **(Exhibit 3)**. ***At no time did Plaintiff flatly refuse to submit to the examinations; rather Plaintiff requested an order prior to the exams because Plaintiff believes that the conditions outlined in Exhibit 2 are warranted, reasonable, and do not in any way prejudice Defendant.*** In this regard, many of the conditions in Plaintiff's proposed order governed the scope of the exam, i.e. what information is necessary and related to the injuries and medical issues in the case.

At the hearing on Defendant's Motion to Compel, (August 25, 2003) Judge Ziolkowski entered an order setting forth the manner, conditions and scope of the exams. **(Exhibit 4).**

Defendant then filed a motion for rehearing **(Exhibit 5)** which Judge Ziolkowski denied in an order entered on September 19, 2003. **(Exhibit 6).** In its Motion For

Rehearing, ***Defendant relied on two affidavits from Dr. Mercier and Dr. Gola who are not even on Defendant's witness list.*** **(Exhibit 7)** ***The Defendant failed to attach affidavits in its Motion for Rehearing from any of the expert witness listed on its witness list.***

On July 21, 2005, the Court of Appeals, held in a published decision that MCL 500.3151 gives an insurer a substantive right to require a claimant to undergo an examination and a substantive right to include reasonable provisions in its insurance policy for such medical examinations. **(Exhibit 8)** However, the court stated that the Defendant does not have a substantive right, but rather a contractual right, to choose the physician conducting the exam. Moreover, the court held that because MCR 2.311 and §3151 do not conflict, §3151 is not alone controlling. In addition, the court held that in the context of Plaintiff's cause of action, the trial court correctly treated Defendant's motion to compel as a discovery device subject to MCR 2.311.

The court also held that the Defendant waived any challenge to the conditions in the order that allow Plaintiff's counsel to be present at the examinations and/or allow videotaping of the examinations because its attorney agreed to these conditions if the court rule applied. With respect to the remaining issues, the court found that the trial court did not abuse its discretion, in including the following conditions in the order:

> 14. That Plaintiff will not be required to give any oral history of the accident.
>
> 15. That Plaintiff will not be required to give any oral medical history not related to the areas of injuries claimed in the lawsuit.

Hon. Henry Saad dissented, stating that §3151 confers an absolute right to a no-fault insurer to an unconditional medical examination. Judge Saad supported his opinion

by stating that the no-fault act provides remedies if an insurer abuses its rights under the statute, citing MCL 500.3142, 3148, and 3153. However, Judge Saad failed to explain how the aforementioned statutory provisions protect a claimant from the potential abuses contemplated by the trial court's order and the specific conditions.

INTRODUCTION

In the following discussion, Plaintiff will demonstrate that the factual and legal basis for Defendant's Application for Leave to Appeal is glaringly deficient.

Prior to the filing of this lawsuit, the Plaintiff's former attorney, Thomas Bertino, made repeated requests to Defendant to schedule medical examinations with physicians of the Defendant's choosing. **(Exhibit 9)** The Defendant failed to do so, and only requested the medical examinations after the lawsuit was filed.

In its Application For Leave to Appeal, Defendant goes to great lengths in accusing the Plaintiff and her counsel of using obstructionist tactics mandated by the Michigan Trial Lawyers Association (MTLA). In response thereto, the conditions in the order entered by the trial court are necessary to protect the Plaintiff from the tactics employed by Defendant State Farm and the "usual suspects" Defendant hires to perform its medical examinations.

Furthermore, Defendant tries to portray State Farm, as an innocent victim of an MTLA conspiracy. However, the MTLA's efforts in this regard, are only in response to the tactics employed by huge insurance companies, who have created an adversarial environment in a No-Fault system that was initially created to reduce litigation and provide prompt payment of benefits to its insureds. In this regard, Defendant State Farm's poor reputation and track record with regard to its utilization of so called "independent medical examiners" is well established. For example, Defendant has demonstrated a preponderance of influencing the defense medical examiners it hires to provide opinions and reports enabling it to deny claims. See, *White v. State Farm*, 680 So. 2d 1 (1996), **(Exhibit 10)**; *Robinson v. State Farm Mut. Auto. Ins.* Co., 2000 Ida.

LEXIS 144 (2000), *vacated and remanded on other grounds*, *Robinson v. State Farm Mut. Auto. Ins.* Co., 137 Idaho 173, 45 P.3d 829 (2002). **(Exhibit 11).** In *Robinson,* the Idaho Supreme Court upheld an award for punitive damages against State Farm due to its use of biased medical record review corporations, in an effort to deny benefits and increase profits.

Moreover a December 5, 2002, article in the *Insurance Journal*, describes an 18-month investigation into Defendant State Farm's unethical practices in processing No-Fault PIP benefits in the State of Minnesota. In this regard, the Insurance division of the - Minnesota Department of Commerce charged Defendant with "pressur[ing] independent medical examiners to change their opinions to reduce PIP [Personal Injury Protection] claim costs." **(Exhibit 12).** It is anticipated that Defendant will argue that the Minnesota example is an isolated incident wherein State Farm did not admit to any wrongdoing. However, under the terms of the settlement, State Farm agreed to:

> **(1) Implement procedures that will prevent the company from influencing or changing the results of independent medical examinations by its employees or vendors.**
>
> (2) Stop using chiropractor examination reports to deny or reduce PIP benefits for non-chiropractic medical treatments.
>
> **(3) Stop forcing policyholders to litigate for benefits they are entitled to under the law.**
>
> **(4) Provide all relevant medical records to the independent medical examiner prior to the examination.**[1]
>
> (5) Cease disclosing personal or privileged information about the insured without written authorization."

[1] Ironically, this requirement is also a condition in Judge Ziolkowski's order. Defendant mockingly attacked the condition as "absurd." However, State Farm

Plaintiff submits that, Defendant State Farm's own actions and claims handling demonstrates a pattern of behavior that encouraged protective action by plaintiff advocates and the courts. Moreover, the conditions in the subject order relate to issues of discovery and procedure and thus are subject to the Michigan Court rules governing the same.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR WHEN IT ENTERED AN ORDER PURSUANT TO MCR 2.311 SETTING FORTH THE SCOPE AND CONDITIONS OF A DEFENSE MEDICAL EXAMINATION IN A FIRST PARTY NO-FAULT CASE.

Defendant's presentation of the Court of Appeals analysis of §3151 is not accurate. In this regard, Defendant claims that the Court of Appeals held that "MCL 500.3151 does not confer on a no-fault insurer a substantive right to have a claimant submit to a medical examination." (Defendant's Application For Leave to the Supreme Court, p. 2) To the contrary, the court clearly held that §3151 gives an insurer a substantive right to require a claimant to undergo an examination and a substantive right to include *reasonable* provisions in its insurance policy for such medical examinations:

> "The Legislature clearly has authorized reasonable provisions for medical examinations in insurance policies. MCL 500.3151. The right to include such reasonable provisions in an insurance policy is a substantive right." (Exhibit 8 - p. 6) (emphasis added)

However, the court stated that the Defendant does not have a substantive right, but rather a contractual right, to choose the physician conducting the exam:

> "Defendant did not establish any substantive right under MCL 500.3151 to have a physician of its choice examine plaintiff. Defendant only established a contractual right that can be upheld if it does not contravene the no-fault act." (Exhibit 8, p.4) (emphasis added)

Thus, Defendant's argument on Issue I, begins with a flawed premise.

In addition, contrary to the Defendant's assertion, the Court of Appeals did not ignore the first sentence of the statute. The court clearly held that the first sentence of §3151 confers a substantive right to an exam "by physicians." The court went on to explain that the second sentence also confers a substantive right to include policy

provisions regarding the exam. However, the provisions themselves, such as the right to choose the physician, are contractual rights:

> "In furtherance of the obligation to provide reasonable proof of the fact and the amount of loss sustained, MCL 500.3151 provides that a claimant shall submit to a medical examination if the claimant's condition is material to a claim for past or future benefits.
>
> * * *
>
> Section 3151 refers to a 'mental or physical examination by physicians,' not to an independent mental or physical examination by a physician of defendant's choice. The basis of defendant's motion for an independent medical examination by a physician of defendant's choice is the following contractual provision in the insurance policy:
>
> > The person making claim also shall:
> >
> > (a) under the personal protection injury protection . . . coverages:
> >
> > * * *
> >
> > (2) be examined by physicians chosen and paid by us as often as we reasonably may require. . . ."
> > (Exhibit 8, pp. 2-3)

Additional evidence of Defendant's deliberate ignorance of the court's analysis of §3151, is in its reference to §3153. Defendant is correct (and the court of Appeals did not hold to the contrary) that §3153 is designed to require and/or penalize claimants who refuse to undergo an examination required by §3151. However, Defendant's discussion of §3153 does nothing to contradict the court's decision that §3151 does not confer a right to an insurer to control discovery in a civil action.

Next Defendant claims that MCR 2.311 conflicts with §3151. First, Defendant argues that the rule and statute conflict because, while the statute gives the insurer a right to have the examination taken, the court rule "requires the insurer to show good cause" before the examination will be permitted. (Defendant's App. For Leave, p.11). This

argument is without merit. In this regard, the "good cause" requirement in MCR 2.311, and the first sentence of §3151, which expressly limits an insurer's right to an examination "[w]hen the mental or physical condition of a person is material to a claim . . ." MCL 500.3151 [emphasis added] are practically identical in meaning and effect.[2]

Defendant also argues that the court rule and statute conflict because "the statute explicitly authorizes the insurer to set reasonable conditions for the examination. The Court Rule wrests that right from the insurer and requires the court (rather than the insurer) to do so." (Defendant's App. For Leave, pp.11-12)

First, as discussed earlier, the statute gives the insurer a right to "include reasonable provisions in a personal protection insurance policy" for the examination. MCL 500.3151 (emphasis added) The court rule does not wrest away any rights from the insurer, because §3151 does not give the insurer the "right to contract to determine how to proceed with discovery in a civil action." (**Exhibit 8** at p. 6)

Contrary to Defendant's claim, the Court Rule does nothing to nullify an insurer's right to the exam. Under the court's decision, the insurer will always be permitted to have an exam when a person's condition is material to a claim. Moreover, an insurer will always be permitted to include reasonable provisions in its policy regarding the claim, including choosing the physicians. However, the rights provided by the statute are not so absolute so as to bar the trial court from invoking applicable court rules in matters of discovery in a civil action to: determine what issues are relevant, safeguard the attorney-client privilege, prevent discovery abuses, etc. Cf. *McDougall v. Schanz*, 461 Mich 15, 3, n15 (1999).

---

[2] The term material means, "being both relevant and consequential; crucial: *testimony material to the inquiry*. *See* Synonyms at relevant." *The American Heritage Dictionary of the English Language*, (4th Ed)

The Defendant also challenges the court's reliance on MCL 500.3159. In this regard, § 3159 states as follows:

> "Discovery
> Sec. 3159. In a dispute regarding an insurer's right to discovery of facts about an injured person's earnings or about his history, condition, treatment and dates and costs of treatment, a court may enter an order for the discovery. The order may be made only on motion for good cause shown and upon notice to all persons having an interest, and shall **specify the time, place, manner, conditions and scope of the discovery. A court, in order to protect against annoyance, embarrassment or oppression, as justice requires**, may enter an order refusing **discovery or specifying conditions of discovery** and may order payments of costs and expenses of the proceeding, including reasonable fees for the appearance of attorneys at the proceedings, as justice requires." (emphasis added)

The Court of Appeals held that "the Legislature has expressed a plain intent in MCL 500.3159 to give the trial court authority to issue a discovery order. MCR 2.311 is consistent with MCL 500.3159." **(Exhibit 8 at p.6)** Defendant claims that as MCL 500.3153 is the enforcement mechanism for §3151, §3159 only pertains to enforcing MCL 500.3158. Defendant's argument fails for several reasons. First, unlike §3153 (which specifically identifies § 3151 and § 3152), §3159 is void of any reference to §3158. To the contrary, §3159 combines the language found in MCR 2.311 and the Court Rule pertaining to protective orders, MCR 2.302(C), both of which are intended to protect against discovery abuses. MCR 2.302 (C) states in pertinent part:

> "(C) Protective Orders. On motion by a party or by the person from whom discovery is sought, and on reasonable notice and for good cause shown, **the court** in which the action is pending **may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense,** including one or more of the following orders:

(Houghton Mifflin Co 2000).

(1) that the discovery not be had;
(2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;
(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters.
(5) that discovery be conducted with no one present except persons designated by the court; . . ." MCR 2.302 [emphasis added]

There is nothing in § 3159 which limits its application to discovery disputes between a no-fault insurer and an employer or health provider. If the Legislature had intended §3159 to only apply to §3158 it would have specifically referenced §3158 in the statute as it did in §3153 with respect to §§ 3151 and 3152. Accordingly, the Court of Appeals was correct when it held that "the trial court correctly treated the motion as a discovery device subject to MCR 2.311." (**Exhibit 8** at p. 6)

II. THE CONDITIONS IN THE TRIAL COURT'S ORDER WERE SUPPORTED BY A VALID FACTUAL AND LEGAL BASIS

In its brief on Appeal below, Defendant arrogantly claimed that the "Plaintiff has shown nothing" to support the conditions in the order. However, MCR 2.311 clearly states that the court may order that the Plaintiff's attorney be present at the examination. Moreover, there is no "good cause" requirement in the Court Rule that Plaintiff must meet before the court can require this, or other conditions, in the order.

Nonetheless, the Plaintiff demonstrated why the conditions in the order are needed. Furthermore, the Court of Appeals alluded to as much when it acknowledged Plaintiff's concerns that the Defendant's examiner would conduct a *de facto* deposition. (**Exhibit 8,** p. 7) In addition, it is notable that in his dissent, Judge Saad does not even

attempt to adopt Defendant's position on this particular point. Furthermore, the conditions at issue inherently dealt with issues of relevancy. The Court of Appeals recognized that trial court may limit discovery to relevant issues. (**Exhibit 8**, p. 7 citing *Bloomfield Charter Twp v Oakland Co Clerk*, 253 Mich App 1, 35; 654 NW2d 610 (2002)). Plaintiff does not have to show particular instances of bias or misrepresentations of the examiners in order to argue that a defense medical exam should be limited to relevant issues. Thus, the Plaintiff has a legal basis for requesting the subject conditions.

Defendant's reliance on *White v. State Farm Mutual Automobile Ins Co*, 680 So2d 1 (La App 1996), is misleading. In *White,* the plaintiff refused to undergo an examination with Dr. McDaniel, the *particular* physician chosen by the Defendant State Farm. **(Exhibit 10)** The issue was "[w]hether a general bias against litigants by an independent medical examiner, as demonstrated by past expert testimony, is sufficient good cause to disallow an independent medical examination by that physician." *Id.* at p. 2. The principles extracted by the Defendant from this decision only relate to whether or not the court should entirely disallow an examination of a particular physician because of documented, long history of partiality. Not whether such a showing must be made in order for the trial court mandates manner, scope and conditions of the exam.

Defendant's reliance on *Metropolitan Property and Casualty Insurance Company v. Overstreet*, et al, 103 S.W. 3d 31 (2003) **(Exhibit 17)** is also misguided. Unlike MCR 2.311, the equivalent Kentucky Rule CR 35.01 in *Metropolitan*, does not provide that the Court may order the attorney for person being examined be present at the exam.[3] In fact, the *Metropolitan* Court acknowledged that "in some states, [including

[3] Kentucky Civil Rule 35.01 provides as follows:

Michigan] the right to external presence in the examination room is provided within the rule." *Id.* at 36. Thus, the *Metropolitan* court had to fashion a test to determine if counsel could be present. MCR. 2.311 leaves that determination to the discretion of the trial court and does not require a particular showing of need.

A. THE TRIAL COURT'S ORDER PERMITTING PLAINTIFF'S ATTORNEY OR REPRESENTATIVES ATTENDANCE AT THE EXAMINATION WAS NOT AN ABUSE OF DISCRETION.

Defendant's entire factual argument relies on Affidavits from two examiners, Dr. Mercier and Dr. Gola, whom the Defendant never requested the Plaintiff be examined by until Defendant filed its Motion for Rehearing. **(Exhibit 5, p. 7)** In fact, Dr. Mercier and Dr. Gola are not even listed on Defendant's witness list. **(Exhibit 7).**

Defendant argues that the presence of the attorney will have a "chilling effect" on the examination and that Plaintiff has not set forth any support for allowing her attorney to be present at the examination. However, Dr. Mercier's past conduct and track record in previous defense medical exams warranted the Court's intervention. In this regard, attached as **Exhibit 14** is a copy of a defense medical exam report, dated January 6, 2003, written by Dr. Mercier for a Defendant in a previous medical malpractice case. The attached report reveals the potentially appalling, unethical, and illegal conduct Dr. Mercier is capable of engaging in during his exams. For example, **Exhibit 14** confirms that he tried to delve into matters which are protected by attorney client privilege, in

---

When the mental or physical condition (including the blood group) of party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician, dentist or appropriate health care expert, or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

particular, the plaintiff's private communications with her counsel regarding settlement negotiations. **(Exhibit 14, p 6)**. This type of inquiry has nothing to do with a proper psychiatric examination and at a minimum, amounts to using the examination to take a second deposition.[4] Accordingly, there is more than good cause for Plaintiff to have her attorney with her at the examinations in order to prevent Dr. Mercier and Dr. Gola from asking improper questions and to ensure that Plaintiff is not intimidated and induced to reveal matters that are protected by attorney client privilege.

Defendant's comparison to Plaintiff's own treating neuropsychologist's report is obtuse. Dr. Weiss' report simply states that the case is in litigation. This is a far cry from Dr. Mercier's past attempts to ascertain the details of conversations between an examinee and his or her attorney.

Defendant also claims that the presence of an attorney creates an adversarial environment during the examination. This is truly laughable. If any party has created an adversarial environment, it is Defendant who has failed to pay one penny of Plaintiff's No-Fault benefits without any legal or factual basis and by selecting medical examiners who consistently serve as experts exclusively for the insurance industry and Defendants.

Defendant's argument is defective for several reasons. Michigan law has clearly recognized the adversarial relationship inherent in a defense medical examination. *Dyer v. Trachtman*, 470 Mich 45, 51; 679 NW2d 311 (2004); *Kloberdanz v. U.S. Fidelity & Guarantee Ins. Co.,* unpublished per curiam opinion of the Court of Appeals, decided July 18, 1997 (Docket No. 192637). **(Exhibit 15)**. In the present case, the Defendant's

[4] Plaintiff submits that one not need a medical degree in order to conclude that whether an offer had been made in a case, what a examinee's attorney said to her regarding a settlement offer, and what amount of money a claimant would settle for, (See Exhibit 14) are proper questions for a defense medical examiner.

medical examiners are agents of the Defendant. They were hired by the Defendants and report to the Defendants. Defense counsel will claim that any conversations between the experts and themselves are privileged and protected by the attorney-work product doctrine. There is a very limited physician-patient relationship between the Plaintiff and the medical examiners, therefore the examiners are free to disclose anything the Plaintiff says to defense counsel, including improperly obtained information. *Dyer v. Trachtman*, supra.

Furthermore, Dr. Mercier and Dr. Gola owe their allegiances to the Defendant that hired them to report their examination findings as an adversarial agent of the Defendant. The reports written by medical examiners are done as an advocate for the Defendant, not the Plaintiff or even as in impartial witness chosen by the Court.

Further, Plaintiff's attorney is not permitted to hire an agent to contact and interview Defendants' agents and employees on relevant issues in the absence of counsel. In order to obtain the necessary information for the lawsuit, Plaintiff's counsel must *depose* defense witnesses with counsel present. There is no defense attorney who would ever permit Plaintiff's counsel or agent to perform ex-parte interviews of his clients.

Typically, counsel for a party would have consulted with its experts prior to discovery depositions of parties and witnesses and would be advised of the necessary information sought by the expert to formulate opinions. This would enable the adversarial party to obtain all of the information under oath and provide the necessary

---

The fact that State Farm would actually attempt to defend this type of conduct is a prime example that Defendant is complicit in the abuses that the subject and court rule are designed to prevent.

information to the retained expert. Permitting the expert witness to later interview a party gives defense counsel "two bites at the apple."

Moreover, the cases cited by the Defendant that prohibit the party's attorney from attending the examination all rely on Fed R Civ P 35(a) which is similar to MCR 2.311 *with one notable exception*: Fed R Civ P 35(a) does not contain the language that is present in MCR 2.311, that the Court may "provide that the attorney for the person to be examined may be present at the examination." MCR 2.311(A). The *1985 Staff Comment* to MCR 2.311 states that MCR 2.311(A) is based on Fed R Civ P 35. Clearly, by adding the aforementioned provision, the drafters of the Court rule considered the issue of the parties' attorney being present at the examination and chose to leave this to the Court's discretion. Defendant dismisses this critical difference as a mere coincidence.

Second, Defendant argues that the presence of an attorney impairs the one-on-one communication necessary for an effective examination. This is not supported by Defendant's experts. In this regard, Dr. Mercier admitted in a signed and notarized Affidavit that he will allow Plaintiff-Appellee's representative to be present during his examination. **(Exhibit 16)**. In addition, Dr. Gola also stated in his Affidavit that Plaintiff's attorney may be present during the clinical interview portion of the examination. **(Exhibit 17)**. (Plaintiff has always conceded that Plaintiff's attorney should not be present, nor should the court require a video recording, during the testing portion of Dr. Gola's exam) Thus, the opinions of Defendant's own experts completely undermine its argument against Plaintiff's counsel being present at the examinations and

resolve the fears expressed by the court in *Metropolitan* regarding the potential for the attorney's presence affecting the examination.

Plaintiff has also raised valid concerns that the examination might be conducted in an unfair manner. Dr. Mercier has already demonstrated his propensity for unethical and unfair conduct. Curiously, Dr. Gola is not even on Defendant's witness list, and was not one of the original examiners initially proposed by Defendant. In fact, Plaintiff did not even become aware of Defendant's request to have Plaintiff examined by Dr. Gola until Plaintiff received Defendant's motion for rehearing. The fact that Defendant has "switched" the examiners after the initial order was entered raises serious concerns as to both Dr. Mercier and Dr. Gola's objectivity. Moreover, given Defendant State Farm's track record of influencing medical examinations, the conditions in Judge Ziolkowski's order are appropriate under the *Metropolitan* factors.

Under the *Metropolitan* factors, Plaintiff-Appellee has shown good cause to have a representative present during the examination.

Defendant argues that it is unfair to allow Plaintiff's attorney to attend the examinations in question where Defendant is not afforded the same opportunity with regard to examinations performed by doctors whom Plaintiff intends to call as witnesses. The *Metropolitan* court does not accept this argument for three reasons:

> " First, we have allowed Dr. Primm's examination to be videotaped only after a showing of good cause. . . . Second, there is an important difference between a party's examination by his own doctor and a court-ordered examination by a doctor hired by that party's adversary. The former is voluntary, usually (though admittedly not always) non-adversarial, and unlikely to produce differing accounts of what occurred during the examination. The latter, as discussed supra, is compelled by the court, inherently adversarial, and likely to produce accusations of misrepresentation like those made by Betty Votaw and Rose Rhodus. Indeed, the

> United States Supreme Court once referred to the compelled examination, not inaccurately, as 'a compulsory stripping and exposure.' *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 252, 11 S. Ct. 1000, 1001, 35 L.Ed. 734 (1891). Third, a trial court simply has no power to order conditions for a party's examination by that party's own doctor." *Id.* at 35-36.

The simple fact is that Dr. Mercier and Dr. Gola are hired and paid by the Defendant to examine the Plaintiff and testify on behalf of the Defendant. Plaintiff's expert witnesses are the original treating doctors, not "hired guns." In this regard, Defendant is comparing apples to oranges. The risk of bias with Plaintiff's treaters is non-existent, where Dr. Mercier and Dr. Gola present serious questions as to the whether they will perform "meaningful examinations."

B. THE DEFENDANT HAS NOT SHOWN AN ABUSE OF DISCRETION FOR ALLOWING AUDIO/VISUAL RECORDING OF THE EXAMINATION

As discussed above, Defendant argues that it is improper for Plaintiff's counsel to be present at the examination, because this may result in the Plaintiff's attorney being disqualified from representing Plaintiff because he may be come a material witness. This problem is easily corrected by having the examination recorded by audio or visual means. Thus, the **record** will be clear and easily resolve any dispute regarding the physicians testimony during cross examination, without the need for Plaintiff's attorney to testify. Plaintiff also has provided good cause to have the exam videoed.

Moreover, the *Metropolitan* Court notes that:

> "federal decisions are of only limited assistance with respect to the propriety of ordering the examination videotaped. To date, no published federal court of appeals opinion has reviewed a federal district court's decision to order, or refuse to order, the videotaping of a Rule 35(a) examination."

Id. at 35., [Emphasis added.]

As to the first factor discussed by the *Metropolitan* Court, the Court noted the minimal disturbance a video camera elicits, as well as the attractiveness of having a video of the exam, stating that:

> "A video camera also has the advantage of creating an exact record of the examination. Even if so inclined, no examiner would physically abuse an examinee in front of a camera. Further, there will be no battle of words at trial. If the examiner remembers the details of the examination differently from the examinee, the videotape will be available to put the matter to rest. See *Gibson v. Gibson*, 456 So. 2d 1320, 1321 (Fla. Dist. Ct. App. 1984) ('it is the privacy of the [examinee] that is involved, not that of the examiner, and if the [examinee] wants to be certain that this compelled, although admittedly reasonable, intrusion into her privacy be accurately preserved, then she should be so entitled.'). *Id.* at 40.

Furthermore, Defendant's experts also concede in their Affidavits that the presence of Plaintiff's attorney and/or recording devices during the clinical examination has no affect on their ability to conduct a proper examination. **(Exhibits 17 and 18)** There is considerable justification for allowing Plaintiff to have her attorney present at the exam to make sure that the defense examiners do not engage in conduct that would violate the conditions of the order, i.e. asking the Plaintiff about information that is protected by attorney client privilege.

The recording of the examinations will provide a clear picture for the jury as to whether the examiners conduct a legitimate examination and prevent the examiners from engaging in unethical conduct.

C. THE TRIAL COURT'S ORDER LIMITING THE SCOPE OF THE EXAMINATION WILL NOT MATERIALLY AND ADVERSELY AFFECT THE ACCURACY AND CREDIBILITY OF THE EXAMINATION RESULTS.

Defendant presents a distorted interpretation of the court's holding as to conditions 14 and 15 of the subject order. The subject conditions state as follows:

> "14. That Plaintiff will not be required to give any oral history of the accident.
>
> 15. That Plaintiff will not be required to give any oral medical history not related to the areas of injuries claimed in the lawsuit." **(Exhibit 4)**

The Defendant claims that the aforementioned conditions (and Court of Appeals opinion) stand for the proposition that the medical examiner cannot obtain an oral history from the claimant.[5] (Defendant's Application For Leave to Appeal to the Supreme Court - Orders Appealed and Relief Sought) Clearly, this interpretation of the court's decision and the subject order is simply false.

In this regard, the Court of Appeals recognized that paragraph 14 simply prevents the medical examiner from inquiring into unrelated issues, such as those that pertain to negligence. It in no way prevents the examiner from obtaining an oral history of how the injury occurred (such as whether she hit her head), medical history, or other matters related to her injuries and condition. Moreover, paragraph 15 simply comports with the doctrines and themes throughout the court rules (and the no-fault statue itself) regarding the scope of discovery as to relevant issues and the in controversy requirement.

However, Defendant maintains that the order prevents the medical examiner from determining what is medically relevant and places that determination in the hands of the Plaintiff's attorney. To the contrary, Paragraph 12 of the order simply allows

Plaintiff's attorney to prevent the medical examiner from violating the terms of the order. i.e. instructing the Plaintiff not to answer a question that is clearly protected by attorney client privilege.[6]

Paragraph 15 is supported by the "in controversy" requirement of MCR 2.314, which serves to limit discovery normally permitted by MCR 2.302(B). Paragraph 15 prevents the examiner from "muddying the waters" by focusing on medical conditions that the Plaintiff has not placed in controversy. Moreover, nothing in the order places the discretion on what is "in controversy" with Plaintiff's attorney; such matters should be left to the trial court's discretion.

Finally, paragraph 16, provides a fair and efficient mechanism wherein the defense examiner is able to obtain any information (not obtained during the clinical or testing examination), that he deems necessary to formulate his opinions, while ensuring that the information is accurate and consistent with the facts. To allow the examiner to ask any question to the Plaintiff without counsel is equivalent to allowing Defendant's agent to have ex-parte contact with a party and essentially amounts to a second deposition of Plaintiff.

The most appropriate method is to require the Defendant to provide all pertinent information regarding the Plaintiff to its own medical examiners and this is necessary for several reasons. First, it ensures that the Defendant's experts consider Plaintiff's entire medical history before forming their opinions, instead of what they choose to arbitrarily

---

[5] Defendant employed the same deceptive language in his Brief on Appeal, however this tactic was easily exposed by the majority.

[6] This is obviously necessary given Dr. Mercier's past conduct of asking a claimant what their attorney thinks about how the case is going.

elicit from the Plaintiff during the interview. Moreover, Defendant has complete access to all of the Plaintiff's medical records.

Second, it prevents the examiner from accusing the Plaintiff from trying to hide significant elements in the Plaintiff's medical history. In this regard, if Defendant's medical examiners are permitted to interview the Plaintiff, without a record, the medical examiners would be free to "select" what portions of the interview they relied upon and there would be no feasible means to cross examine them on the information that they really elicited from Plaintiff. To use the old cliché it would result in a "he said she said" scenario.

Based on the foregoing, it is clear that paragraphs 12-16 of the instant order are warranted and do not adversely affect the accuracy and credibility of the medical examiners results.

III. THE COURT OF APPEALS DECISION NOT TO ADDRESS THE OTHER CONDITIONS WAS CORRECT BECAUSE DEFENDANT WAIVED ANY CHALLENGE TO THE CONDITIONS.

Defendant misstates the Court of Appeals' holding in regard to the first two contested conditions: (1) whether Plaintiff's attorney can be present at the examination and (2) whether to allow videotaping of the examinations. In this regard, Defendant claims that the court refused to address these issues because "they were first raised in the trial court on rehearing, and that State Farm's Appellate brief failed to address the standards for rehearings." (Defendant's Supreme Court Application For Leave Brief p.2) The Court actually held that Defendant waived any challenge to the above referenced conditions because its attorney agreed to these conditions if the court rule applied. (Exhibit 8 at p. 7) It was only in the footnote that the Court added that the Defendant's

failure to brief the standards for rehearings precluded appellate review. In this regard the Court stated on page 7, n. 8:

> "With regard to the first two conditions, defendant waived any challenge to the conditions because its attorney agreed to these conditions if the court rule applied. Error requiring reversal must be that of the trial court, and not error to which an aggrieved party contributed by plan or negligence. *Phinney v Verbrugge*, 222 Mich. App. 513, 537; 564 N.W.2d 532 (1997). A party waives an issue by affirmatively approving of a trial court's action. *People v Carter*, 462 Mich. 206, 215-216; 612 N.W.2d 144 (2000). n8
>
> ---
>
> n8 Although defendant, through new counsel, later challenged the trial court's decision in a motion for rehearing, defendant's appeal brief fails to address the standards for rehearings. Defendant's failure to brief this necessary issue precluded appellate review. *Roberts & Son Contracting, Inc v North Oakland Development Corp*, 163 Mich. App. 109, 113; 413 N.W.2d 744 (1987)."

Moreover, Defendant made no attempt whatever to demonstrate palpable error by the trial court. Rather, Defendant quite literally presented the same issues upon which the trial court had already ruled upon, either expressly or by reasonable implication, and proceeded, in large part, simply to reargue them, albeit with new arguments and new evidence.

The express purpose of MCR 2.119(F) is to provide a curative remedy when, the trial court, in the course of ruling on a motion, has been misled by an obvious (palpable) error. Although, the trial court is not necessarily restricted by this criteria, the tenor and express language of the rule was clearly not intended, (as Defendant maintains) to provide an absolute right to raise and preserve new issues, arguments, and evidence for appeal, while depriving the opposing party of that same right.

Moreover, the express language in 2.119(F)(2) renders Defendant's interpretation nonsensical and unjust. In this regard, the party opposing the Motion for Reconsideration, will in most instances,[7] not have an opportunity to respond to new evidence, new issues raised in said motion, and new arguments. Thus, if this Court were to adopt Defendant's position, a party filing a motion for reconsideration would have the unilateral right to raise and preserve new issues, arguments, and evidence for appeal, while the party opposing such a motion would be deprived of that same right. Defendant's "spin" on the court rule encourages a strategy of litigation by ambush, which is clearly not the policy behind 2.119(F).

[7] The rule states that the court has discretion whether to hold oral argument and/or allow response briefs. 2.119(F)(2)

REASONS TO DENY LEAVE TO APPEAL

This Court should deny Defendant's Application For Leave to Appeal for the reasons outlined above.

First, the Court of Appeals decision does not prevent an insurer from obtaining an medical examination of a claimant, nor does it prevent an insurer from choosing its own physician. The Court correctly held that §3151 does not confer a right to an insurer and its insured to contract to determine how to proceed with discovery in a civil action. Defendant's claim that the decision will encourage plaintiff's to file suit, in attempt to circumvent the requirements of §3151 is nothing but hyperbole intended to inflame the passions of this Court.

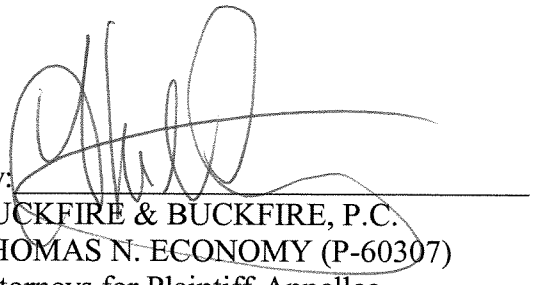
Furthermore, Defendant's insinuation that plaintiff's (and their attorney's) are duplicitous (just because they invoke their legal rights under the court rules) is offensive. Does Defendant ascribe the same labels to those who invoke the court rule when §3151 is not at issue? This Court should ignore such sanctimonious hyperbole and deny Defendant's Application For Leave.

Moreover, Defendant has failed at every level to factually demonstrate how the conditions at issue disrupt its ability to discover plaintiff's medical condition. As discussed herein, the affidavits by its examiners actually contradict many of the claims Defendant makes opposing the orders. In addition, Defendant's unabashed defense of Dr. Mercier's past conduct only reaffirms why such orders are needed.

The Defendant would ask this court to close its eyes to the unfortunate realities of the defense medical examination process and hold that a trial court have no control what is undisputedly a discovery device. Moreover, the Defendant would have this court

overturn many years of precedent with respect to the standards for preserving issues for Appeal (including cases decided by the current members of this court) and issue a decision that would effectively result in a motion for reconsideration being used as a weapon as opposed to a curative device used to correct obvious errors.

The trial court and the Court of Appeals got it right the first time. Defendant's Application For Leave should be denied.



By: _____
BUCKFIRE & BUCKFIRE, P.C.
THOMAS N. ECONOMY (P-60307)
Attorneys for Plaintiff-Appellee
17117 West Nine Mile Road, #1135
Southfield, MI 48075
(248) 569-4646

Dated: September 24, 2005

INDEX TO EXHIBITS

Exhibit

1. April 17, 2003, Facsimile from Evaluations Plus, Inc. to Plaintiff's counsel, Daniel Buckfire, Esq., notifying Plaintiff's counsel of Defense medical examinations scheduled by Defendant with Drs. Kirschner, Sessa, and Lowen.

2. Proposed order sent to Defendant's counsel

3. Defendant's Motion to Compel Independent Medical Exams

4. August 25, 2003, Order Allowing Physical Examination of Plaintiff Pursuant to MCR 2.311

5. Defendant's Motion For Rehearing

6. September 19, 2003 Order Denying Motion for Rehearing

7. Defendant's Witness List

8. *Muci v. State Farm Mutual Automobile Ins Co*, ____ Mich App ____; ____ NW2d ____ (decided July 21, 2005)

9. Correspondence from Thomas J. Bertino, Esq. to Mr. B.J. Olendorf

10. *White v. State Farm*, 680 So. 2d 1 (1996)

11. *Robinson v. State Farm Mut. Auto. Ins. Co.*, 2000 Ida. LEXIS 144 (2000)

12. December 5, 2002 article from the, *Insurance Journal*

13. *Metropolitan Property and Casualty Insurance Company v. Overstreet*, et al, 103 S.W. 3d 31 (2003)

14. Report of Dr. Raymond Mercier in another case

15. *Kloberdanz v. U.S. Fidelity & Guarantee Ins. Co.*, unpublished per curiam opinion of the Court of Appeals, decided July 18, 1997 (Docket No. 192637)

16. Affidavit of Dr. Mercier, dated September 9, 2003

17. Affidavit of Dr. Thomas Gola, dated September 10, 2003

STATE OF MICHIGAN
IN THE SUPREME COURT

ANILA MUCI,

Plaintiff-Appellee,

vs.

STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,
a foreign corporation

Defendant-Appellant.

Supreme Court No. 129388
Court of Appeals No. 251438

Wayne County Circuit Court
No. 03-304534-NF

/

BUCKFIRE & BUCKFIRE, P.C.
BY: DANIEL L. BUCKFIRE (P-46286)
THOMAS N. ECONOMY (P-60307)
Attorneys for Plaintiff-Appellee
17117 West Nine Mile Road, #1135
Southfield, MI 48075
(248) 569-4646

HEWSON & VAN HELLEMONT, P.C.
BY: JAMES F. HEWSON (P27127)
Attorneys for Defendant-Appellant
29900 Lorraine, Suite 100
Warren, MI 48093
(586) 578-4500

GROSS, NEMETH,
& SILVERMAN, P.L.C
BY: JAMES G. GROSS (P28268)
Attorneys of Counsel for
Defendant-Appellant
615 Griswold, Suite 1305
Detroit, MI 48226
(313) 963-8200

/

PROOF OF SERVICE

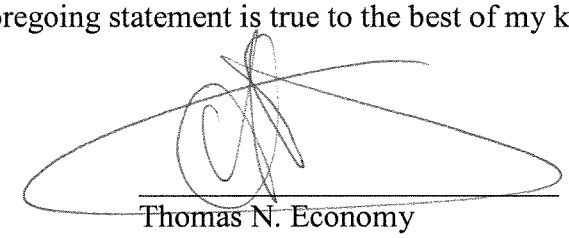
STATE OF MICHIGAN)

COUNTY OF WAYNE)

THOMAS N. ECONOMY, being first duly sworn, deposes and says that on September, 24, 2005, he did serve a copy of **PLAINTIFF-APPELLEE'S RESPONSE TO DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL and this PROOF**

OF SERVICE upon: **JAMES G. GROSS, 615 Griswold, Suite 1305, Detroit, Michigan 28226**; and **JAMES F. HEWSON, ESQ., 29900 Lorraine, Suite 100, Warren, Michigan 48093** by mailing same to said attorney's offices and said clerk in a sealed envelope, properly addressed, with first class postage pre paid thereon, and by depositing same in the Untied States Mail.

I declare that the foregoing statement is true to the best of my knowledge, information, and belief.



Thomas N. Economy

Dated: September 24, 2005